V.I.P. d/b/a Olympic Specialties *and* International Brotherhood of Electrical Workers, Local Union 357, AFL–CIO. Case 28–CA–15938

August 11, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

On June 2, 2000, Administrative Law Judge James L. Rose issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Nathan W. Albright, Esq., for the General Counsel.
Jeffrey Ian Shaner, Esq., of Las Vegas, Nevada, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me on April 11, 2000, at Las Vegas, Nevada, on the General Counsel's complaint which alleged that the Respondent discharged its employee Timothy Fee because he had engaged in union and other protected, concerted activity in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. §151, et seq. The Respondent generally denied that it committed any violations of the Act.

On the record as a whole including my observation of the witnesses, briefs, and arguments of counsel, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The Respondent is a Nevada corporation engaged in business as an electrical contractor at various jobsites in Nevada including one at Valley High School in Clark County, Nevada. During the course of doing business, the Respondent annually purchases and receives from points outside the State of Nevada goods, products, and materials valued in excess of $50,000. The Respondent admits and I conduce that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Electrical Workers, Local Union 357, AFL–CIO (the Union) is admitted to be, and I find, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

While there are some serious disputes (to be discussed below), the parties agree to the general facts involved in this matter. Timothy Fee learned that the Respondent was hiring installers (electricians) via a newspaper ad and he filed an application. The Respondent's sole owner, Frank Beebe, interviewed Fee and hired him as an installer (which basically consisted of running conduit) at $18 per hour on the Valley High School job. Fee started work on June 8, 1999.[1] The Respondent had three or four other installers on this job as well as Leadman Joseph Montalvo.

In early July, Fee, and the others, received a $2-per-hour wage increase because, according to Beebe, they had complained about not being paid as much as other employees doing the same work. About the same time, Beebe was contacted by an official of the Clark County School system to inform him that there had been a complaint that Beebe was not paying his employees appropriately under some kind of prevailing wage law. Fee testified that he made the complaint, after first contacting the Federal and State Departments of Labor; but there is no basis to conclude that Beebe knew Fee initiated this complaint. Further, Beebe met with employees and told them he was in fact in compliance. There is no evidence that he was not, though unexplained is the discrepancy between Fee's wage rate and the rates for alarm work ($16.78 per hour) and communication work ($24.39 per hour).

On July 20,[2] while running conduit above a drop ceiling, Fee accidentally drilled into a water pipe. According to Beebe, this kind of thing happens occasionally and was not the reason he fired Fee. However, Beebe learned from Montalvo that Fee did cause unusual damage to the ceiling frame and refused to help clean up the mess caused by the water and broken ceiling tiles.

In fact, Montalvo testified that when Fee caused the break, he told him to clean up the mess, but Fee did not, leaving to do other work. Then "maybe" a day or two later, Fee damaged ceiling tile and hangers while enlarging the hole so it could be fixed. While Montalvo's testimony leaves a lot to be desired concerning the timing of these events, it appears credible that Fee in fact caused unreasonable damage.

Montalvo reported to Beebe that "the ceiling was damaged and there was debris all over the place." Beebe instructed Montalvo to have Fee report to Beebe's office at 7 a.m. the next day. Fee showed up about 7:15 a.m. and was discharged. Beebe

[1] All dates are in 1999, unless otherwise indicated.

[2] Montalvo testified that this occurred "[m]aybe about the second week in July, the 10th or the 12th." Although Montalvo seemed credible, and no longer works for the Respondent, this date is questionable. July 10 was a Saturday and, according to Fee's hand kept record, he did not work. Fee worked July 12, but again, according to his record, had a typically full day of production in 6.5 hours. On the other hand, again according to Fee's record, on July 20, he had minimal production in 8 hours, indicating that he spent substantial time doing something other than running conduit. Fee's records tend to support Beebe's testimony that the waterpipe incident occurred on July 20, the day before he discharged Fee. And I so find.

testified that the reason he discharged Fee was the damage Fee had caused; but Beebe also testified that if Fee had been on time for this interview and apologized he might not have fired him.

Later that day, Beebe drafted a discharge letter to Fee (which Fee denied receiving) wherein he give three reasons for the termination: (1) the job damage, (2) reporting for work late the last day, and (3) a "general bad attitude and causing friction between other employees."

Beebe testified that he learned about the supposed "friction between employees" after discharging Fee and that this reason probably should not have been in the letter. Montalvo testified that in a phone conversation, Beebe said he fired Fee because Fee had not been truthful with him.

Fee's testimony that Beebe called him early in July and told him to organize on his own time is denied as was Fee's testimony that Beebe told him during the discharge interview that "you are giving me too much grief."

In addition to contacting the Federal and State Labor Departments and the school district, Fee also testified that he solicited some other employees to sign authorization cards for the Union. But as with the other activity, he has no knowledge that Beebe knew about this.

B. Analysis and Concluding Findings

Counsel for the General Counsel correctly notes that the basic elements of proof in a discriminatory discharge case are: protected activity by the alleged discriminatees, employer knowledge of such activity, employer animus against such activity and such activity motivated the discharge. Since there is rarely direct evidence of unlawful motive, such is typically proved by inference from finding the first three elements and finding that the purported basis for the discharge is so unreasonable as to imply another basis. E.g., *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466 (9th Cir. 1965). Similarly, company knowledge and animus can be inferred from all the circumstances such as the small size of the work force and other unlawful activity. However, all these inferences can be rebutted by direct credible testimony.

In essence, the General Counsel argues that the damage Fee caused was not unusual, was not serious and would not normally be cause for discharge. Therefore, the true reason must have been Fee's protected activity in contacting the Federal and State Departments of Labor and the school district, complaining of his and other employees' wage inadequacy and soliciting authorization cards.

The circumstance of Fee's discharge is suspicious and it is possible that he was discharged for having engaged in protected, concerted, or union activity. However, I conclude that the credible evidence is insufficient to prove such was the case.

First, there is no evidence of animus. The only direct evidence of company knowledge that Fee engaged in any protected activity was his testimony that Beebe called him on Sunday and told him to organize on his own time, and statements Fee claims Beebe made during the discharge interview. This was denied by Beebe. In short, a critical element of this case depends on crediting Fee's testimony and discrediting Beebe's. I discredit Fee, especially such of his testimony which could link whatever protected activity he engaged in with knowledge by Beebe. I found Fee not to be worthy of belief. Not only am I persuaded in this by his demeanor, but also by his testimony concerning his application and his alleged telephone conversation with Beebe concerning organizing on his own time.

He testified that he went to work on June 8, the day he filed his application and was interviewed by Beebe, notwithstanding that his application was dated May 3, giving a first available date for employment as May 4. Fee's explanation was, "I often make mistakes on dates." I simply do not believe that on June 8 he would write May 3 and 4. Rather, I believe that he considered when he went to work in relation to filing the application to be a material fact, and he sought to mislead me. More persuasive is Beebe's testimony that Fee filed the application and was interviewed on May 5, and then called Beebe repeatedly until he was put to work in June.

Though I consider when Fee went to work in relation to his application to be unimportant, Fee's testimony, I conclude, demonstrates a lack of credibility. In addition, Fee testified that Beebe called him (or in another version, was told to call Beebe) to discuss assigning Fee to another job, and he said, "[O]rganize on your own time." For Bebee to treat Fee as a valued employee and at the same time warn him about engaging in union activity during working hours, where there is no evidence he did so, is not plausible.

Finally, I discredit Fee's testimony that a week before his discharge Beebe told him, "And here you are, you're checking on my license and that, giving me a bunch of grief." There is no indication how checking on Beebe's license would motivate the discharge, if in fact Fee did so. Further, Beebe credibly testified that he first learned of such an assertion by Fee after the discharge.

I discredit Fee and conclude that for the General Counsel to prevail, the element of company knowledge would have to be established by evidence independent of Fee's testimony. I conclude there is an insufficiency of such evidence.

Montalvo testified that he knew Fee was organizing for the Union, but he did not tell Beebe. Though Montalvo may have been a supervisor, he is no longer employed by the Respondent and was called a witness by the General Counsel. Thus it would not be reasonable to impute his knowledge to Beebe, given his specific, credible denial.

Beebe testified that he did not know of Fee's involvement with the Union or handing out authorization cards until Fee told him during the discharge interview. I found Beebe forthcoming and credible. For instance, he testified that Montalvo told him that employees were signing authorization cards. But there is no evidence that he knew Fee was passing them out, or even signed one. And he testified that later in the morning after discharging Fee, he met with other employees on the Valley High job and asked what they thought "about it." That is when he learned that Fee had been causing friction among employees. I conclude that the credible evidence is insufficient to establish that Beebe knew Fee had been engaged in union activity at the time of the discharge.

Nor is there sufficient evidence to conclude that any other protected activity engaged in by Fee would have motivated Beebe to discharge him. Beebe testified that Fee agreed to work for $18 per hour then "three weeks later he had a problem with that," indicating some irritation. Nevertheless, there is no real basis to conclude that Fee's complaint about wages would motivate Beebe to discharge him. Several employees complained about the wages they were receiving, and Beebe gave them a $2-per-hour raise in order to keep them.

Finally, none of the others who complained about their wages were discharged. Similarly, other employees signed authorization cards, and were not discharged.

I therefore conclude that the General Counsel failed to prove that the Respondent discharged Timothy Fee in violation of the Act and I shall recommend that the complaint be dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The complaint is dismissed in its entirety.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.